UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LATHAN MATRELL BARNETT, Defendant.	No. CR02-4099-MWB **REPORT AND RECOMMENDATION ON MOTIONS TO DISMISS SECOND SUPERSEDING INDICTMENT[1], AND ORDER DENYING MOTION FOR DISCOVERY**

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[1]The court's prior Report and Recommendation (Doc. No. 55) on two of the defendant's motions to dismiss is **withdrawn**. The court now submits this Report and Recommendation on all of the defendant's pending motions.

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I. INTRODUCTION

On January 22, 2004, the grand jury handed down a Second Superseding Indictment (the "Indictment") against the defendant Lathan Matrell Barnett, charging him with violations of federal firearms laws. (Doc. No. 36) On February 27, 2004, Barnett filed three motions to dismiss the Indictment, and one alternative motion for discovery. In his first motion (Doc. No. 42), Barnett seeks dismissal of Counts 1, 3 and 4 of the Indictment on the basis that they are not sufficiently detailed to support a conviction. In his second motion (Doc. No. 43), he seeks dismissal of Count 4 of the Indictment on the basis that the charge is unconstitutionally vague. In his third motion (Doc. No. 46), Barnett, an African American, seeks dismissal of all charges against him on the basis that he is being prosecuted selectively or vindictively. If the court denies dismissal on the basis of selective or vindictive prosecution, then Barnett seeks discovery to support such a claim. (Doc. No. 47) The plaintiff (the "Government") resists all four of these motions. (*See* Doc. Nos. 51-54)

Barnett subsequently filed a motion (Doc. No. 60) to amend his first motion to dismiss (Doc. No. 42), to clarify his grounds for urging the dismissal of Count 1. The court granted the motion, and the Government filed a resistance to Barnett's amended argument (Doc. No. 62).

In the trial scheduling order entered on September 9, 2003 (Doc. No. 24), pretrial motions in this case were assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. Accordingly, the court held a hearing on the pending motions on April 1,

2004. Assistant U.S. Attorney Kevin Fletcher appeared on behalf of the Government. Barnett appeared in person with his attorney, Dewey Sloan. The Government offered the brief testimony of one witness, Randall Lee Kramer of the O'Brien County Sheriff's Office.

The court directed the parties to file additional authorities relating to Barnett's motion to dismiss Count 1 of the Indictment. On April 5, 2004, Barnett filed a further motion to dismiss Count 1 "as a matter of Statutory Construction." (Doc. No. 64) The Government resisted the motion on April 7, 2004. (Doc. No. 66) Barnett also filed a brief purporting to be a " second memorandum" in support of his motion to dismiss Count 1 as a matter of statutory construction, but actually relating to his motion to dismiss on the basis of selective prosecution (Doc. No. 65). The Government has filed a resistance to the "second memorandum." (Doc. No. 67).

The court finds the motions now have been fully submitted, and turns to consideration of Barnett's motions.

II. FACTUAL BACKGROUND

This case arises from events that occurred on October 8, 2002, while Barnett and a female named Shelley Gonnerman were visiting Shane William Meyer in Meyer's apartment. Barnett and Gonnerman were sitting in Meyer's living room. Barnett picked up a sawed-off shotgun owned by Meyer, and the gun went off, striking Gonnerman in the face. She died as a result of her injuries.

The Indictment charges Barnett with one count of using and possessing the shotgun, a destructive device, during and in relation to a crime of violence (Count 1); one count of unlawfully making, and aiding and abetting the making of, firearms (Count 2); one count

of receiving and possessing unlawful firearms (Count 3); and one count of being an unlawful user of controlled substances in possession of firearms (Count 4).

III. DISCUSSION

A. Motion to Dismiss for Lack of Specificity (Doc. No. 42)

Barnett seeks dismissal of Counts 1, 3 and 4 of the Indictment on the basis that "they are insufficient to [s]tate offenses warranting his conviction." (Doc. No. 42-1, p. 1) He addresses each count separately, and the court will do so, as well. Preliminarily, the court will identify the law applicable to Barnett's challenge to the Indictment on the basis of its lack of adequate specificity.

1. Applicable law

The Eighth Circuit Court of Appeals has explained the requirements for an indictment, as follows:

> "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); *see [United States v.] Dolan*, 120 F.3d [856,] 864 [(8th Cir. 1997)] ("To be sufficient, an indictment must fairly inform the defendant of the charges against him and allow him to plead double jeopardy as a bar to future prosecution."). Typically an indictment is not sufficient only if an essential element of the offense is omitted from it. *[United States v.] White*, 241 F.3d [1015,] 1021 [(8th Cir. 2001)].

United States v. Cuervo, 354 F.3d 969, 983 (8th Cir. 2004). *See Bousley v. United States*, 523 U.S. 614, 618, 118 S. Ct. 1604, 1609, 140 L. Ed. 2d 828 (1998) ("[T]he first and

most universally recognized requirement of due process" is that a defendant receive "real notice of the true nature of the charge against him.") (quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S. Ct. 572, 574, 85 L. Ed. 859 (1941)).

In the *White* opinion cited by the court in *Cuervo*, the Eighth Circuit noted, "Usage of a particular word or phrase in the indictment is not required as long as we can recognize a valid offense and the form of the allegation 'substantially states the element[s].' . . . In fact, we will find an indictment insufficient only if an 'essential element "of substance" is omitted.'" *White*, 241 F.3d at 1021 (quoting *United States v. Mallen*, 843 F.2d 1096, 1102 (8th Cir. 1988)). However, as Chief Judge Mark W. Bennett noted in *United States v. Nieman*, 265 F. Supp. 2d 1017 (N.D. Iowa 2003):

> Although no particular words or phrases are necessarily required, "[i]t is well-established in this circuit that citation of the statute, without more, does not cure the omission of an essential element of the charge because bare citation of the statute 'is of scant help in deciding whether the grand jury considered' the missing element in charging the defendant." *[United States v.] Olson*, 262 F.3d [795,] 799 [(8th Cir. 2001)] (quoting *United States v. Camp*, 541 F.2d 737, 740 (8th Cir. 1976), and also citing *United States v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988)).

Neiman, 265 F. Supp. 2d at 1028 (quoting *United States v. Johnson*, 225 F. Supp. 2d 1009, 1015-16 (N.D. Iowa 2002) (footnote omitted)). Judge Bennett explained the court first must determine how the statutes and case law define the offenses charged in each count of the indictment, and then must determine whether the counts of the indictment adequately allege the offenses, as defined. *Nieman*, 265 F. Supp. 2d at 1029.

The court will apply these standards to Barnett's challenges to the Indictment.

2. Count 1

Count 1 of the Indictment charges Barnett as follows:

> On or about September 1, 2002, and continuing through about October 8, 2002, in the Northern District of Iowa, the defendant, LATHAN MATRELL BARNETT, knowingly used and carried a short-barreled and shortened length firearm, that is, a weapon made from one New England Firearms, model Pardner SB1, 20 gauge single-shot shotgun, serial number partially readable as NB64197, barrel length 11 3/4 inches, overall length 18 1/4 inches, a destructive device, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, making, receiving, or possessing a short-barreled and shortened length firearm, in violation of Title 26, United States Code, Sections 5841, 5845, 5861, and 5871, as fully described in Counts 2 and 3 of this Second Superseding Indictment[,] and the firearm discharged.
>
> This was in violation of Title 18, United States Code, Sections 924(c)(1)(B)(ii), 924(c)(1)(B)(i), 924(c)(1)(A)(iii), and 924(c)(1)(A).

(Doc. No. 36)

Barnett argues Count 1 is insufficient because it (1) "fails to state with sufficiency, that Defendant Barnett carried the alleged weapon with knowledge"; (2) "fails to state that Barnett knowingly used or carried an unlawful firearm"; (3) "fails to state that Barnett had knowledge of the specific characteristics of the firearm constituting a destructive device"; (4) "fails to identify the specific crime of violence to which the Defendant must defend himself"; and (5) "fails to identify the victim against whom the alleged crime of violence was committed." (Doc. No. 42-1, p. 1)

Barnett's first challenge to Count 1 is incomprehensible. He argues Count 1 fails to state he "carried the alleged weapon with knowledge." (*Id.*) Count 1 states Barnett

"knowingly used and carried" the weapon. The court finds Count 1 sufficiently alleges Barnett carried the weapon "with knowledge."

His second argument similarly lacks merit. He claims Count 1 fails to state he "knowingly used or carried an unlawful firearm." (*Id.*) Count 1 states Barnett "knowingly used and carried" a particular weapon that had a short barrel and shortened length, and further alleges the firearm was illegal because it was not registered as required by law. Therefore, Count 1 sufficiently alleges Barnett "knowingly used or carried an unlawful firearm."

In his third argument, Barnett asserts Count 1 is insufficient because it fails to allege he "had knowledge of the specific characteristics of the firearm constituting a destructive device."[2] In his brief, Barnett argues Count 1's use of the term "destructive device" creates both "a new crime from the original crime indicted," and also "a sentencing enhancement to the identified statute." (Doc. No. 42-2, p. 3) He argues further, "When a violation of a statute involving a destructive device creates a sentencing enhancement, the Indictment must specify the specific requirements of that destructive device. The Indictment must also include the Mens Rea requirement of knowingly with respect to the use of a weapon and the specific characteristics of that weapon." (*Id.*) In support of these arguments, Barnett cites *Castillo v. United States*, 530 U.S. 120, 122-23, 120 S. Ct. 2090, 2942, 147 L. Ed. 2d 94 (2000); and *Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793, 1797, 128 L. Ed. 2d 608 (1994). Barnett misstates the application of these decisions to the language of Count 1 in the present case.

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[2] In this case, the relevant characteristics identifying the sawed-off shotgun as a "destructive device" are the size of the shotgun's barrel (having "a bore of more than one-half inch in diameter"), and the fact that a sawed-off shotgun is not "generally recognized as particularly suitable for sporting purposes." 26 U.S.C. § 5845(f).

In *Castillo*, the Supreme Court held Congress's reference to particular types of firearms in 18 U.S.C. § 924(c)(1) defines a separate, substantive crime, rather than referring to a sentencing factor, and therefore, "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt." *Castillo*, 530 U.S. at 123, 120 S. Ct. at 2092. In the present case, Count 1 sufficiently identifies the firearm type.

Staples, on the other hand, addresses the language of section 5861(d), which makes it unlawful for a person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record[.]" 26 U.S.C. § 5861(d). The Supreme Court held that although section 5861(d) is silent concerning the *mens rea* required for a violation, the Court nevertheless will impose "a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal." *Staples*, 511 U.S. at 605, 114 S. Ct. at 1797. The Court noted its holding was narrow, and was dependent upon the Court's view "that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect [in drafting section 5861(d)]." *Staples*, 511 U.S. at 619-20, 114 S. Ct. at 1804. Thus, the *Staples* Court declined to hold, as the Government urged, that possession of *any* type of gun should alert an individual to the probable existence of regulations governing the gun's possession, and therefore dispense with the *mens rea* requirement in all gun possession cases.

However, particularly applicable to the present case is the *Staples* Court's recognition that sawed-off shotguns fall outside the category of guns that are widely accepted as lawful possessions. The Court observed, "Of course, we might surely classify certain categories of guns – ***no doubt including the machineguns, sawed-off shotguns,***

and artillery pieces that Congress has subjected to regulation – as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades in [*United States v. Freed*, 401 U.S. 601, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971)]." *Staples*, 511 U.S. at 611-12, 114 S. Ct. at 1800 (emphasis added). As a result, *Staples* supports the conclusion that the determination of whether the firearm at issue in this case was a "destructive device" as defined in 26 U.S.C. § 5845, triggering the sentencing enhancement specified in 18 U.S.C. § 924(c)(1)(B)(ii), *does not* require the Government to show Barnett was aware of the specific characteristics that brought the weapon under the definition of "destructive device." The Eighth Circuit Court of Appeals has reached the same conclusion. In *United States v. Barr*, 32 F.3d 1320 (8th Cir. 1994), the defendant, who was in possession of a sawed-off shotgun, argued "she did not have the requisite knowledge for a conviction under the National Firearms Act [26 U.S.C. § 5861(d)]." 32 F.3d at 1323. The court analyzed the *Staples* holding, and found as follows:

> Unlike the modified semi-automatic rifle in *Staples*, a sawed-off shotgun is clearly not a traditionally lawful weapon and Barr had no legitimate expectation that the weapon was not subject to regulation.
>
> . . .
>
> Where, as here, the characteristics of the weapon itself render it "quasi-suspect," *Staples* does not require proof that the defendant knew of the specific characteristics which make the weapon subject to the Act. The Government need only prove that the defendant possessed the "quasi-suspect" weapon and observed its characteristics. A defendant who observes such a weapon cannot possess it with innocence.

Barr, 32 F.3d at 1325.

The court finds the same analysis applies whether the issue is the defendant's knowledge of the characteristics that make a weapon subject to section 5861(d), or the defendant's knowledge of the characteristics that make a weapon a "destructive device" pursuant to section 5845(f). Furthermore, the Government arguably does not have to prove Barnett had actual knowledge of the characteristics making the shotgun a "destructive device" in any event because whether the shotgun was a "destructive device" is not an element of the crime; rather, the "destructive device" language imposes a sentencing enhancement, raising the minimum sentence to thirty years. *See* Eighth Circuit Model Criminal Jury Instruction 6.18.924C, Comment 7 ("The Committee believes that actual knowledge of the specific characteristics of the firearm resulting in enhancement of the punishment is not required in an 18 U.S.C. § 924(c) prosecution. *United States v. Harris*, 959 F.2d 246, 257-61 (D.C. Cir. 1992).").

Count 1 alleges Barnett "knowingly used and carried a short-barreled and shortened length firearm." The court finds that to the extent Barnett's knowledge of the gun's characteristics is necessary, "the indictment in this case closely tracked the language of the statute and therefore fairly imported the scienter requirement of § 924(c)." *United States v. Oakie*, 12 F.3d 1436, 1440 (8th Cir. 1993) (citing *United States v. Gutierrez*, 987 F.2d 1463, 1466-67 (7th Cir. 1992)).

In considering Barnett's fourth challenge to Count 1, the court first will determine how the statute defines offenses under 18 U.S.C. § 924(c)(1). The United States Supreme Court has reasoned that offenses under section 924(c) "have two basic elements: 1) the carrying, possession, or use of a firearm, and 2) the underlying offense that the carrying, possession, or use of the firearm is furthering." *Cuervo*, 354 F.3d at 991 (citing *United States v. Rodriguez-Moreno*, 526 U.S. 275, 119 S. Ct. 1239, 143 L. Ed. 2d 388 (1999)). *See United States v. Damm*, 133 F.3d 636, 639 (8th Cir. 1998) ("A conviction under

section 924(c) requires proof of two elements: (1) that the defendant used or carried a firearm; and (2) that the use or carrying was during and in relation to a crime of violence [or drug trafficking crime].") (citing *Smith v. United States*, 508 U.S. 223, 227-28, 113 S. Ct. 2050, 2053-54, 124 L. Ed. 2d 138 (1993)).

As to the first of these requirements, Count 1 of the Indictment charges that Barnett "knowingly used and carried" a specific sawed-off 20-gauge shotgun (the "New England shotgun"), "a destructive device," and he did so "[o]n or about September 1, 2002, and continuing through about October 8, 2002." (Doc. No. 36) Thus, Count 1 charges that he carried, possessed, or used a firearm, as required by section 924(c). However, as a practical matter, Count 1 is unclear in that it alleges Barnett began using and carrying the New England shotgun on or about September 1, 2002, and he continued to do so through October 8, 2002. The court has some concern about whether this element, as charged, fairly informs Barnett of the true nature of the charge against him. Even if Count 1 does pass muster with regard to the first element required by section 924(c), Count 1 becomes incomprehensible with regard to the second element.

Count 1 charges Barnett with using and carrying the New England shotgun "during and in relation to a crime of violence for which he may be prosecuted in a court of the United States." It goes on to identify the crime of violence as follows:

> making, receiving, or possessing a short-barreled and shortened length firearm, in violation of Title 26, United States Code, Sections 5841, 5845, 5861, and 5871, as fully described in Counts 2 and 3 of this Second Superseding Indictment and the firearm discharged.

(Doc. No. 36, Count 1, p. 2) Counts 2 and 3 charge Barnett with making, aiding and abetting the making of, receiving, and possessing "one or more" of two separate firearms -- a 16-gauge shotgun (the "H&R shotgun") and a 12-gauge shotgun (the "Savage Arms

shotgun"). Count 1 therefore fails to identify with sufficient specificity the crime of violence underlying the charge. As written, there is no way Barnett can discern which of the firearms -- the H&R shotgun or the Savage Arms shotgun -- he allegedly made, received, or possessed at the time he allegedly used and carried the New England shotgun. It is also impossible to discern from Count 1 which of the referenced firearms is "the firearm" that "discharged." As written, the phrase "and the firearm discharged" appears to relate to one of the firearms listed in Counts 2 and 3; however, this conclusion is less than clear, and in fact statements made by the parties' counsel at the hearing lead the court to believe the firearm that discharged actually was the New England shotgun.[3]

Further, Count 1's incorporation of Counts 2 and 3 by reference is insufficient under these facts, not only because of the ambiguity discussed above, but also on a more superficial level. At first blush, it appears the Government is charging Barnett with using and carrying a firearm in furtherance of making, receiving or possessing *the same firearm*. This was the court's initial impression of Count 1, and obviously is the interpretation placed on the Count 1 by defense counsel. His brief on the issue argues the Government is alleging "the crime of violence is possession *of the same sawed-off shotgun*" as the destructive device. (Doc. No. 64-2, emphasis added) The court questioned both parties' counsel carefully during the hearing about whether the same gun could be the subject of

[3]This discussion does not even reach the weakness of the facts underlying the charge. The Government's witness at the hearing testified the only evidence that Barnett was involved in modifying any of the shotguns is the statement of Shane Meyer. Apparently, other witnesses have stated Barnett was present when one unspecified gun was sawed off, but only Meyer has stated Barnett participated in that conduct. Even if the allegations in Counts 2 and 3 are true, it appears the H&R and Savage Arms shotguns were modified at some time prior to October 8, 1992, and remained in Meyer's possession, which begs the question of how Barnett could use and carry the New England shotgun "during and in relation to" the modification of the other two guns. Although the evidence against Barnett is not under scrutiny here, these questions lend support to the conclusion that Count 1 is insufficient, and the grand jury should be required to state the offense charged in Count 1 with sufficient clarity for Barnett to prepare a defense.

both the charged offense and the underlying crime of violence, and the Assistant U.S. Attorney failed to clarify, even at that time, that the charge related to separate and distinct weapons. The issue was only clarified in the Government's recent brief (Doc. No. 66), in which the Government asserts "Barnett was involved in the making, receiving or possessing [of] two sawed-off shotguns separate from the sawed-off shotgun he used and carried on October 8, 2002." (*Id.*, p. 2)[4]

There is little question that the possession of a sawed-off shotgun can constitute a crime of violence for purposes of a section 924(c) offense. In an Appendix to his post-hearing brief, Barnett cites twenty-five different cases to that effect (Doc. No. 64-3), and Barnett concedes "the possession of a sawed-off shotgun qualifies as a crime of violence." (Doc. No. 64-2 (citing *United States v. Allegree*, 175 F.3d 648, 661 (8th Cir. 1999)). In addition, in the context of sentencing, numerous circuit courts of appeal, including the Eighth Circuit, have held that because sawed-off shotguns lack any usefulness except for violent purposes, possession of such weapons is inherently dangerous, presents a serious risk of physical injury, and therefore constitutes a "crime of violence." *See United States v. Allegree*, 175 F.3d 648, 651 (8th Cir. 1999) (holding prior conviction for possession of sawed-off shotgun justified sentencing defendant as career offender; possession of sawed-off shotgun qualifies as crime of violence for purposes of sentencing enhancement because "such weapons are inherently dangerous and lack usefulness except for violent and criminal purposes"); *United States v. Serna*, 309 F.3d 859 (5th Cir. 2002) (possession of sawed-off shotgun "poses a serious potential risk of physical injury to another and is therefore a crime of violence under U.S.S.G. § 4B1.2(1)); *United States v. Johnson*, 246

[4]Notably, in its brief, the Government clarifies that the date upon which Barnett allegedly used and carried the New England shotgun was October 8, 2002, and implies the underlying crime of violence relates to *both* of the firearms listed in Counts 2 and 3, rather than "one or more."

F.3d 330, 334-35 (4th Cir. 2001) ("possession of a sawed-off shotgun is a crime of violence under USSG § 4B1.1 because the possession of such a weapon always creates a serious potential risk of physical injury to another"); *United States v. Brazeau*, 237 F.3d 842, 845 (7th Cir. 2001) ("possession of a sawed-off shotgun -- by the very nature of the weapon -- always creates a serious risk of physical injury to another under the Sentencing Guidelines"; *United States v. Dunn*, 946 F.2d 615, 521 (9th Cir. 1991) (possession of unregistered firearm is crime of violence under 18 U.S.C. § 16(b), for purposes of determining career offender status under Sentencing Guidelines); *see also United States v. Fortes*, 141 F.3d 1, 6-8 (5th Cir. 1998) (possession of sawed-off shotgun is "violent felony" for purposes of Armed Career Criminal Act).

The Government's reliance on *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995) might be appropriate if Count 1 properly charged the crime, but the cases's applicability is not entirely clear based on the language used in Count 1.

In summary, Count 1 fails to specify the date on which Barnett allegedly used and carried the New England shotgun, fails to identify with any clarity the underlying crime of violence, and fails to specify which of the three guns in question "discharged." The court is unable to "recognize a valid offense" from the language of Count 1. Because the Indictment fails to inform Barnett fairly of the charge against which he must defend, the court finds Barnett's motion to dismiss Count 1 for insufficiency should be **granted**. *See Cuervo*, 354 F.3d at 983; *White*, 241 F.3d at 1021.

Barnett's final challenge to Count 1 is that it "fails to identify the victim against whom the alleged crime of violence was committed." Barnett is confusing the present action, which arises solely from violations of the statutes governing firearms, with the State action arising from Gonnerman's death. The Indictment does not charge Barnett with a violation of section 924(j), which provides a sentencing enhancement when a person

"who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm[.]" The court finds the Indictment is not insufficient for failing to name a victim; the alleged crime of violence was committed against society, not against a particular person.

In conclusion, the court finds Barnett's motion to dismiss Count 1 for insufficiency should be **granted**.

3. Count 3

Count 3 of the Indictment charges Barnett as follows:

> On or about September 1, 2002, and continuing through about October 8, 2002, in the Northern District of Iowa, the defendant, LATHAN MATRELL BARNETT, did knowingly receive and possess one or more firearms, that is:
>
> (1) a weapon made from one Harrington & Richardson (H&R), model Val-Test, 16 gauge single-barrel shotgun, no serial number, barrel length 11 3/4 inches, overall length 18 1/4 inches, and;
>
> (2) a weapon made from one Savage Arms, model Springfield Repeater, 12 gauge pump shotgun, serial number 38543, barrel length 15 1/4 inches;
>
> neither of which were [sic] registered to defendant in the National Firearms Registration and Transfer Record.
>
> This was in violation of Title 26, United States Code, Sections 5841, 5845, 5861(d), and 5871.

(Doc. No. 36)

Barnett argues Count 3 should be dismissed because it "fails to state whether or not [he] had the requisite knowledge of the characteristics of the firearms to bring the firearms

within the meaning of the statutes and identify [them] within the specifics of 26 U.S.C. § 5841, 5845, 5861(d) and 5716 [sic][5]." (Doc. No. 42-1, p. 2)

The drafting committee for the Eighth Circuit Model Criminal Jury Instructions adopted the D.C. Circuit's explanation in *United States v. Harris*, 959 F.2d 246, 257-61 (D.C. Cir. 1992), of the distinction between the scienter requirements of 26 U.S.C. § 5861 and 18 U.S.C. § 924(c). The committee noted that although a "defendant's conviction for using a machine gun in violation of 18 U.S.C. § 924(c) could stand without proof that the defendant 'knew the precise nature of the weapon,' . . . the conviction for possessing the same weapon in violation of 26 U.S.C. § 5861 could not." Eighth Circuit Model Criminal Jury Instruction 6.18.924C, Comment 7 (citing *Harris*, 959 F.2d at 259).

Thus, the Indictment must allege Barnett had knowledge of the specific characteristics that brought the guns within the purview of section 5861(d). Section 5861(d) makes it unlawful for a person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record[.]" Count 3 alleges Barnett "knowingly" received and possessed one or more firearms that were not registered to him as required by law.

Further, for purposes of section 5861, a "firearm" is defined as follows:

> The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length;

[5]This is obviously a scrivener's error, as there is no section 5716 in title 26. Barnett undoubtedly meant to refer to section 5817, cited in Count 3 of the Indictment.

> (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer . . .; and (8) a destructive device. . . .

26 U.S.C. § 5845(a).

Count 3 alleges Barnett knowingly received and possessed one or both of two specific "firearms," and provides descriptions of the firearms, including the barrel lengths that bring them within the definition of "firearm" set forth in section 5845. Barnett argues although the Indictment alleges he "knowingly received and possessed a firearm[,] . . . [it] does not specify which firearm and the characteristics of the firearm which bring it within the meaning of the statute." (Doc. No. 42-2, p. 4) Given the language of Count 3, Barnett clearly is mistaken. Count 3 specifies two firearms, including the characteristics that bring them under the statute, and alleges Barnett "did knowingly receive and possess one or more" of the specified firearms.

The court finds no merit in Barnett's motion to dismiss Count 3 for lack of specificity, and therefore recommends the motion be denied as to Count 3.

4. Count 4

Count 4 of the Indictment charges Barnett as follows:

> On or about September 1, 2002, and continuing through about October 8, 2002, in the Northern District of Iowa, the defendant, LATHAN MATRELL BARNETT, then being an unlawful user of controlled substances, did knowingly receive and possess, in and affecting commerce, firearms, specifically:
>
> (1) a weapon made from one Harrington & Richardson (H&R), model Val-Test, 16 gauge single-barrel shot-gun, no serial number, barrel length 11 3/4 inches, overall length 18 1/4 inches, and;

> (2) a weapon made from one Savage Arms, model Springfield Repeater, 12 gauge pump shotgun, serial number 38543, barrel length 15 1/4 inches;
>
> which had been shipped and transported in interstate commerce.
>
> This was in violation of Title 18, United States Code, Sections 922(g)(3) and 924(a)(2).

(Doc. No. 36)

Barnett argues Count 4 should be dismissed because it (1) "fails to state what controlled substance, if any, of which the Defendant was an unlawful user"; (2) "fails to state the time frame during which the Defendant was the user"; (3) "fails to state the Defendant possessed or received the firearm knowingly"; and (4) "fails to state that the firearm was transported across state line at some time during or before the Defendant's possession of it." (Doc. No. 42-1, p. 2)

The second of these arguments is inexplicable. Count 4 clearly states the time period of September 1 through October 8, 2002, and alleges Barnett, "then being an unlawful user of controlled substances," received and possessed the guns. Therefore, the indictment alleges Barnett was an unlawful user of controlled substances from September 1, 2002, through October 8, 2002. Notably, the Government does not have to prove – and, therefore, the Indictment does not have to allege – that Barnett "was actually using or addicted to drugs at the exact moment he [received or possessed] the firearms in question in order to be convicted as an 'unlawful user' [under section 922(g)(3)]." *United States v. McIntosh*, 23 F.3d 1454, 1458 (8th Cir. 1994) (citing *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988)); *accord United States v. Collins*, 350 F.3d 773, 775 n.2 (8th Cir. 2003), *reh'g denied*, Jan. 15, 2004; *United States v. Mack*, 343 F.3d 929, 933 (8th Cir. 2003).

Barnett's third and fourth arguments are similarly meritless. Count 4 clearly alleges Barnett "did *knowingly* receive and possess" the firearms. Count 4 further states the firearms "had been shipped and transported in interstate commerce." It goes without saying that the firearms "had been" shipped or transported at some time during or before Barnett possessed the firearms. Any other conclusion would represent a physical and temporal impossibility.

Addressing Barnett's first argument, that Count 4 fails to name the controlled substance of which Barnett allegedly was a user, the court again looks to how the statute and case law define the offense charged. Section 922(g)(3) makes it unlawful for any person "who is an unlawful user of or addicted to any controlled substance . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(3).[6]

Barnett argues the Indictment "fails to state an essential element of the offense" because it fails to "identify with specificity what being [an] 'unlawful user of controlled substance while being in possession of firearms' means." (Doc. No. 4202, p. 4)

The court finds the language of Count 4 closely tracks the statute, and adequately alleges the offense charged. Barnett has cited no cases, and the court has found none, that would require the indictment to state the specific controlled substance the defendant allegedly used.[7] The court therefore recommends Barnett's motion to dismiss Count 4 for insufficiency be denied.

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[6]Section 924(1)(2), the other statute identified in Count 4, merely states the penalty for violating section 922(g); *i.e.*, imprisonment for up to ten years, and/or a fine.

[7]As Barnett suggests in his motion (*see id.*), the heart of his challenges to Count 4 go to whether the statute is vague in failing to define the term "unlawful user." His separate motion to dismiss Count 4 as unconstitutionally vague is discussed in the next section of this opinion.

B. Motion to Dismiss Count 4 as Unconstitutionally Vague (Doc. No. 43)

As noted above, Count 4 charges Barnett with being an unlawful user of a controlled substance while receiving and possessing firearms. Barnett argues Count 4 is unconstitutionally vague as applied to him, on the following four grounds: (1) the statute and Count 4 fail to distinguish between past and present use of unlawful controlled substances; (2) the statute and indictment fail to identify temporal proximity between the unlawful use of controlled substances and the possession of firearms; (3) the statute and indictment "fail to identify whether 'possession' must be actual or constructive and any mens rea requirement associated therewith"; (4) the statute and indictment "fail to identify whether or not the statute applie[s] generally or whether the statute applies to only a particular Defendant." (Doc. No. 43-2).

The constitutionality of section 922(g)(3) has been discussed numerous times by the Eighth Circuit Court of Appeals and other courts. The discussion most often centers around the meaning of "unlawful user of a controlled substance," a term that has not been defined by Congress. Courts uniformly have held the statute is constitutional, even when expressing reservations about its clarity. *See United States v. Collins*, 350 F.3d 773, 775 n.2 (8th Cir. 2003) (defining the term in accordance with Eighth Circuit Model Jury Instruction 6.18.922(g)(3), as "a person who uses a controlled substance in a manner other than as prescribed by a licensed physician"); *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2003) ("The term 'unlawful user' is not otherwise defined in the statute, but courts generally agree the law runs the risk of being unconstitutionally vague without a judicially-created temporal nexus between the gun possession and regular drug use.") (citing *Jackson* and *Purdy*, *infra*)).

See also United States v. Jackson, 280 F.3d 403, 406 (4th Cir. 2002) ("[W]e do not doubt that the exact reach of the statute is not easy to define[.]"); *United States v. Herrera*,

289 F.3d 311, 320-24 (5th Cir. 2002) (reaching narrow interpretation that "unlawful user" in section 922(g)(3) means "one who uses narcotics so frequently and in such quantities as to lose the power of self control and thereby pose a danger to the public morals, health, safety, or welfare . . . [*i.e.*,] someone whose use of narcotics falls just short of addiction"), *rev'd in part*, 313 F.3d 882 (5th Cir. 2002) (*per curiam*) (finding evidence was sufficient to sustain conviction) (*but see* Dissent, suggesting questions court should address in considering what "the words 'unlawful user,' as they appear in § 922(g)(3), require in the way of proof beyond a reasonable doubt"); *United States v. Edwards*, 182 F.3d 333 (5th Cir. 1999) (finding statute constitutional as applied to specific defendant); *United States v. Purdy*, 264 F.3d 809 (9th Cir. 2001) (statute not unconstitutionally vague as applied to defendant); *United States v. Oberlin*, 145 F.3d 1343, 1998 WL 279398 (9th Cir. 1998) (phrase "unlawful user" is "not impermissibly vague and was intended by Congress 'to keep firearms out of the hands of those not legally entitled to possess them. . . ,'" quoting *United States v. Ocegueda*, 564 F.2d 1363, 1365-66 (9th Cir. 1977) (interpreting predecessor statute)); *United States v. Bennett*, 329 F.3d 769 (10th Cir. 2003) ("unlawful user of . . . any controlled substance" differs in meaning from "addicted to any controlled substance"; "unlawful user" language, adopted by U.S.S.G. § 2K2.1, was not unconstitutionally vague as applied to defendant); *United States v. Sanders*, 43 Fed. Appx. 249, 2002 WL 1644097 (10th Cir. 2002) (statute not unconstitutionally vague as applied to defendant, but noting section 922(g)(3) is probably "unconstitutionally vague in the absence of a judicially-created requirement of sufficient temporal nexus"); *United States v. Terrell*, 172 F.3d 880, 1999 WL 107083 (10th Cir. 1999) (statute not unconstitutionally vague as applied to defendant, citing *McIntosh*). *Cf. United States v. Letts*, 264 F.3d 787 (8th Cir. 2001) (overruling challenges to section 922(g)(3) on grounds that it exceeds reach of Commerce Clause and creates an impermissible "status" offense).

Despite the body of case law available to assist the court in considering Barnett's vagueness challenge, it would be premature for the court to offer any recommendation regarding Barnett's motion at this time. The United States Supreme Court has explained:

> It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963).

United States v. Mazurie, 419 U.S. 544, 550, 95 S. Ct. 710, 714, 42 L. Ed. 2d 706 (1975). *See United States v. Reed*, 114 F.3d 1067 (10th Cir. 1997) (error for court to consider vagueness challenge to section 922(g) prior to trial, even upon government's proffer of facts to which defendant did not object; "such a sensitive and fact intensive analysis . . . should be based only on the facts as they emerge at trial"; noting district court's concern was valid that the statute does not provide a time frame within which the unlawful use of controlled substance must occur for someone to be an "unlawful user") (citing *Reed*, 924 F. Supp. at 1055).

Therefore, at this stage, the court recommends any ruling on Barnett's motion to dismiss Count 4 as being unconstitutionally vague be reserved until after the evidence comes in at trial.[8]

C. Motion to Dismiss for Selective or Vindictive Prosecution (Doc. No. 46), and Motion for Discovery (Doc. No. 47)

Barnett argues he is being prosecuted selectively or vindictively because he is being treated differently from his former codefendant Shane Meyer. The court found Barnett had

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[8]Notably, however, the court finds Barnett's fourth argument – that the statute and indictment "fail to identify whether or not the statute applie[s] generally or whether the statute applies to only a particular Defendant" -- to be incomprehensible.

made "a credible showing of different treatment of similarly situated persons" (*i.e.*, Barnett and Meyer) sufficient to raise at least an inference of selective prosecution that warranted an evidentiary hearing. (Doc. No. 56, citing *United States v. Armstrong*, 517 U.S. 456, 470, 116 S. Ct. 1480, 1489, 134 L. Ed. 2d 687 (1996)) In its order scheduling the hearing, the court noted in a footnote that Barnett had failed to make even a preliminary showing to support a claim of *vindictive* prosecution, which requires a showing that the prosecution is intended to punish the defendant for exercising a legal right. (*Id.* n.1, citing *United States v. Beede*, 974 F.2d 948, 951 (8th Cir. 1992) (citing *United States v. Goodwin*, 457 U.S. 368, 384 n.19, 102 S. Ct. 2485, 2494 n.9, 73 L. Ed. 2d 74 (1982))

At the hearing on April 1, 2004, Barnett withdrew his claim of vindictive prosecution.

The Eighth Circuit repeatedly has explained the high standard a defendant must meet to establish a claim for selective prosecution. In *United States v. Parham*, 16 F.3d 844 (8th Cir. 1994), a case that continues to be cited for the proposition, the court held as follows:

> To establish a prima facie case [of selective prosecution], a defendant must demonstrate: 1) that he has been singled out for prosecution while others similarly situated have not been prosecuted for similar conduct and 2) that the government's action in thus singling him out was based on an impermissible motive such as race, religion, or the exercise of constitution rights. *United States v. Matter*, 818 F.2d 653, 654 (8th Cir. 1987). The defendant's burden is a heavy one, and because we afford broad discretion to prosecuting authorities, we require a showing of intentional and purposeful discrimination. *Id.* at 654-55. Absent this prima facie showing, the prosecution is presumed to have been undertaken in good faith. *Id.* at 655. Since determination of a prima facie case of selective prosecution is essentially a factual inquiry, we review the district court's determination on the establishment of a

> prima facie case of selective prosecution only for clear error. *United States v. Gutierrez*, 990 F.2d 472, 475 (9th Cir. 1993).

Parham, 16 F.3d at 846. *Accord United States v. Hirsch*, 360 F.3d 860, 864 (8th Cir. 2004) (citing *United States v. Perry*, 152 F.3d 900, 903 (8th Cir. 1998)); *United States v. Leathers*, 354 F.3d 955, 963 (8th Cir. 2004).

Barnett presented no evidence at the hearing on his motion. Instead, he argues an inference of selective prosecution arises from material already in the record. The court admitted into evidence at the hearing the following exhibits: Defense Ex. 1, Government's Sentencing Memorandum with regard to Shane Meyer (Doc. No. 46-2, Ex. 1); Defense Ex. 2, letter from Dewey P. Sloan, Jr. to Kevin Fletcher dated September 22, 2003 (*id.*, Ex. 2); Defense Ex. 3, letter from Dewey P. Sloan, Jr. to Kevin Fletcher dated December 12, 2003 (*id.*, Ex. 3); Defense Ex. 4, letter from Dewey P. Sloan to Kevin Fletcher dated November 21, 2003 (*id.*, Ex. 4).

Barnett argues the Meyer sentencing memorandum and the correspondence between Barnett's attorney and the Assistant United States Attorney establish a prima facie case of selective prosecution. He argues the exhibits show Meyer was at least as much at fault as Barnett was in the events that led to Gonnerman's death. For example, Barnett notes that in the sentencing memorandum, the Government argues Meyer stole the guns in question from his parents, he had the guns in his possession, and he secured the assistance of others in helping him saw off the barrels. Barnett also argues the Government was willing to engage in plea negotiations with Meyer, but refused all of his overtures to commence plea negotiations. Because Meyer is white and Barnett is black, he argues these events show he is being prosecuted selectively. The Government responds that it is justified in distinguishing the two defendants by the fact that Barnett was holding a sawed-off shotgun at the time is discharged and caused Gonnerman's death.

The court finds no merit in Barnett's claim. He has failed to make a threshold showing that raises even an inference of racial motivation in his prosecution. The court therefore recommends Barnett's motion to dismiss the Indictment on the basis of selective prosecution be **denied**.

Barnett argues, in the alternative, that he is unable to do more than raise an inference of selective prosecution unless he is allowed to conduct discovery. However, to paraphrase the *Hirsch* court, before he can obtain discovery, Barnett must "produce at least some credible showing of differential treatment of similarly situated members of other races or a protected class." *Hirsch*, 360 F.3d at 864 (citing *United States v. Perry*, 152 F.3d 900, 903 (8th Cir. 1998)). Barnett has failed to meet this standard. His motion for discovery (Doc. No. 47) is, therefore, **denied**.

D. Motion to Dismiss Count I as a Matter of Statutory Construction (Doc. No. 64)

The Government argues Barnett never raised the issue of dismissal of Count 1 on the basis of statutory construction prior to filing his motion subsequent to the evidentiary hearing. The court finds Barnett has raised no new arguments in this most recent motion. The court discussed the issue fully above, in connection with Barnett's motion to dismiss Count 1 on the basis that it fails to identify specifically a crime of violence underlying his use and carrying of a firearm. The only new material submitted with the present motion is the Appendix of cases decided under section 924. The court specifically asked the parties at the hearing to submit any authorities they could locate on the issue of whether the "making, receiving, or possessing" of a sawed-off shotgun properly can be the crime of violence underlying the charge of "using and carrying" a firearm. The court therefore

overrules the Government's objection to the motion and, as above, recommends Count 1 be dismissed for insufficiency.

IV. CONCLUSION

For the reasons discussed above, Barnett's motion for discovery (Doc. No. 47) is **denied**. In addition, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections to this Report and Recommendation as set forth below, that the court take the following actions with regard to Barnett's motions to dismiss:

1. The motion to dismiss Counts 1, 3 and 4 for insufficiency (Doc. No. 42) should be **granted in part and denied in part** -- the motion should be **granted** as to Count 1, and **denied** as to Counts 3 and 4.

2. The court should **reserve** ruling on the motion to dismiss Count 4 as unconstitutionally vague (Doc. No. 43) until the close of the evidence at trial.

3. The motion to dismiss for selective or vindictive prosecution (Doc. No. 46) should be **denied**.

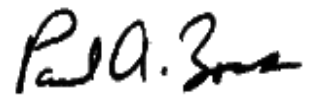
4. The motion to dismiss Count 1 "as a matter of statutory construction" (Doc. No. 64) should be **granted in part and denied in part** -- the motion should be **granted** to the extent it raises no issues not previously raised in Barnett's motion to dismiss Count 1, and **denied** to the extent it relies on the erroneous assumption that the charge in Count 1 and the underlying crime of violence in Count 1 relate to the same firearm.

Any party who objects to this report and recommendation must serve and file specific, written objections **within 5 court days from this date**. Any response to the objections must be served and filed **within 2 court days after service of the objections**. The parties are cautioned that the time for objections has been shortened due to the impending trial, and no extensions will be granted absent extraordinary cause.

If either party objects, or anticipates objecting, to this report and recommendation, that party must immediately order a transcript of all portions of the record the district court judge will need to rule on the objections.

IT IS SO ORDERED.

DATED this 9th day of April, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT